Supreme Court, U. S.
FILED
JUN 21 1

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-1534

DR. ELERY LAY, ET AL.,
Petitioners,

vs.

CITY OF KINGSPORT, TENNESSEE, ET AL.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-1524

DR. ELERY LAY, ET AL.,
Petitioners,

vs.

CITY OF KINGSPORT, TENNESSEE, ET AL.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

In this Brief in Opposition to Petition for Certiorari, we shall refer to the Petitioner Lay and the Voter Petitioners, collectively, as the "Petitioner Lay"; and to the Respondents, City of Kingsport, Tennessee, and its officials, collectively, as "City of Kingsport".

QUESTIONS PRESENTED

Question Number One. Is a substantial federal question, requiring determination by a three-judge district court, presented by the Complaint wherein the Petitioner Lay seeks to enjoin the City of Kingsport from enforcing "conflict of interest" Statutes and a City Ordinance on the ground that the First and Fourteenth Amendments guarantee Petitioner Lay the right to contract with the City of Kingsport as Assistant Superintendent of City Schools while he serves as City Alderman, and to serve concur-

rently as Assistant Superintendent and City Alderman, when the duties of these two city offices admittedly involve a direct conflict of interest?

Question Number Two. Does the "anti-injunction" Statute (28 U.S.C. §2283) prohibit the District Court from granting the Petitioner Lay an injunction enjoining the City of Kingsport from enforcing a final judgment of the Tennessee Court of Appeals rendered against the Petitioner Lay in *City of Kingsport* v. *Lay*, ... Tenn. App. ....., 459 S.W. 2d 786 (1970), which case involved the same conflict of interest Statutes and Ordinance referred to in Question Number One above?

STATEMENT OF THE CASE

In the Petition for Certiorari, the Petitioner Lay omits any reference to the admitted direct conflict of interest between the duties of Petitioner Lay as an Alderman for the City of Kingsport and his duties as Assistant Superintendent of City Schools. The Petition also fails to refer to the prior State Court litigation between the City of Kingsport and the Petitioner Lay. The Respondents, in order to correct these omissions, adopt as their Statement of the Case the finding of facts by the United States Court of Appeals in this case, as follows:

> "* * * The plaintiffs are Dr. Elery Lay, Assistant Superintendent of Schools for the City of Kingsport, Tennessee, who is a duly elected Alderman for the City of Kingsport, Tennessee, and a class consisting of registered voters of the City of Kingsport, who in May, 1969, voted for Dr. Lay for Alderman. One of Dr. Lay's functions as Assistant Superintendent of Schools was the initial preparation of the annual school budget, including his salary as Assistant Superintendent. An Alderman for the City of Kingsport has the

duty of voting approval or disapproval of the school budget, and also the duty of voting appropriation of public monies as required by the approved budget, including his own salary as Assistant Superintendent.

"Shortly, after the election, at which Dr. Lay was elected as Alderman, the defendants instituted a declaratory judgment action in the Tennessee Courts to determine whether Dr. Lay could serve as both Alderman and Assistant Superintendent and receive salaries for services in each of such positions, in the light of the provisions of certain Tennessee Statutes and an Ordinance of the City of Kingsport.

"The Tennessee Court of Appeals, ... Tenn. App. ....., 459 S.W. 2d 786 (1970), determined that under the provisions of the applicable Statutes and Ordinance there was a conflict of interest which prevented Dr. Lay from receiving any salary as Assistant Superintendent so long as he held the office of Alderman. Thereafter, the plaintiffs instituted the present action seeking an injunction to prohibit the defendants from applying the above cited Statutes and Ordinance, as required by the decision of the Tennessee Court of Appeals. * * *" (App. A to Petition, pp. A1-A3)

The facts found by the United States Court of Appeals and quoted above are not in dispute. These facts are either admitted in the Complaint or have been judicially determined in the prior State Court litigation between these parties. A copy of the Complaint is attached hereto as Appendix A; and a copy of the Opinion of the Tennessee Court of Appeals in *City of Kingsport* v. *Lay*, ... Tenn. App. ....., 459 S.W. 2d 786, 787, 789 is attached hereto as Appendix B.

REASONS FOR DENYING PETITION FOR CERTIORARI

1. The constitutional questions presented by the Complaint are unsubstantial because "obviously without merit".

We respectfully disagree with the allegations in the Petition that the Tennessee conflict of interest Statutes, as interpreted by the Courts of Tennessee "effectively prohibit the Petitioner Lay from holding his duly elected public office" (See Petition, p. 3).

The Petitioner's First Amendment rights have not been denied. The Petitioner Lay has not been denied the right either to seek or hold public office. He engaged freely and actively in his political campaign for election as City Alderman. The Voter Petitioners voted for him in this election. He is serving today as City Alderman and has been so serving since the day he was sworn into office following his election. The opinion of the Tennessee Court of Appeals in *City of Kingsport* v. *Lay*, ... Tenn. App. ..... 459 S.W. 2d 786 (1970), denies no citizen the right to run for or serve as City Alderman. It merely holds that a City Alderman cannot contract with the City to hold a second City office, when the duties of the second City office involve a direct conflict of interest with the duties of a City Alderman.

We disagree with the statement that, as interpreted by the Tennessee courts, the Tennessee Statutes "effectively deny thousands of its citizens the right * * * of holding public office and of effective exercise of franchise". (See Petition, p. 8). The Tennessee Court of Appeals in *City of Kingsport* v. *Lay*, supra, expresses no opinion regarding the applicability of the conflict of interest statutes to any class of persons. The role which the Assistant Superintendent plays in initially fixing his own salary is the very basis of the opinion of the Tennessee Court. Ob-

viously, classroom teachers who have no function in fixing their own salaries are in a different class from that of Petitioner Lay. In view of the admitted conflict of interest present in this case, it is not necessary to speculate on what the Tennessee courts might hold in the absence of this fact. Certainly there are not "thousands" of Assistant Superintendents with the same duties as those of Petitioner.

Assuming that the action of the City of Kingsport in refusing to contract with Petitioner Lay as Assistant Superintendent is "state action" within the meaning of the Fourteenth Amendment, there is no denial of equal protection unless this action of the City constitutes "intentional or purposeful discrimination". In *Snowden* v. *Hughes,* (1943) 321 U.S. 1, 7-8, 88 L. Ed. 497, 502-503, 64 S. Ct. 397, this Court held that a candidate for state office may not claim a "denial of equal protection unless there is shown to be present * * * an element of intentional or purposeful discrimination. * * *" (321 U.S. 9-10, 88 L. Ed. 503). In *Turner* v. *Fouche,* (1970) 396 U.S. 346, 24 L. Ed. 2d 567, 90 S. Ct. 532, this Court held that a candidate for state office must be burdened with "invidiously discriminatory disqualifications" in order to constitute a denial of equal protection (24 L. Ed. at page 580).

There is no allegation that the City of Kingsport has contracted with other City Aldermen for their services in a second City office, the duties of which involve a direct conflict of interest. It is not alleged that the City has extended such a privilege to other citizens. No facts are alleged in the Complaint from which it might be inferred that either class or racial discrimination motivated the City in refusing to contract with the Petitioner Lay as Assistant Superintendent.

When tested by *Snowden* v. *Hughes* and *Turner* v. *Fouche*, the Complaint fails to present a substantial federal constitutional question based on the equal protection clause because it alleges no facts tending to show that invidious discrimination is involved in this case.

There are two additional decisions by this Court which, we submit, establish the lack of merit in the constitutional claims of the Petitioner Lay.

As pointed out in the Opinion of the United States Court of Appeals, the constitutionality of the Hatch Act, which prohibits most employees of the Executive Branch from taking part in political campaigns, was upheld in *United Public Workers of America* v. *Mitchell*, 330 U.S. 75 (1947) (See App. A to Petition, pp. A4-A5). The reasoning of *Mitchell* is applicable to this case. The action of a City Alderman in contracting with the City for a second City office, involving a conflict of interest, would, we submit, in the words of *Mitchell* "* * * menace the integrity of the service * * * (and) * * * legislation to forestall such danger * * * is required. * * *" (330 U.S. at page 103). Conflict of interest statutes are the answer of the Legislature to this problem.

The purpose and compelling interest which prompted passage of the federal conflict of interest statute is discussed by this Court in *U. S.* v. *Mississippi Valley Generative Company*, (1961) 364 U.S. 520, 5 L. Ed. 2d 268, 81 S. Ct. 294, wherein it was stated that the federal statutes "were designed to prohibit government officials from engaging in conduct that might be inimical to the best interests of the general public" (364 U.S. at page 548, 5 L. Ed. 2d at page 287); and further that "the seriousness of this evil quite naturally led Congress to adopt a statute whose breadth would be sufficient to cope with the evil." (364 U.S. at page 561, 5 L. Ed. 2d at page 295).

We respectfully submit that the Complaint presents no substantial federal question.

2. A Three-Judge Court is not required by 28 U.S.C. §2281 to determine matters of purely local concern.

28 U.S.C. §2281 provides in part as follows:

"An * * * injunction restraining the enforcement * * * of any State statute by restraining the action of any officer of such State in the enforcement * * * of such statute * * * shall not be granted * * *." (except by a Three-Judge Court).

By its terms, 28 U.S.C. §2281 applies only in those cases which seek an injunction restraining action of a State officer in the enforcement of a challenged State statute.

There is no allegation in the Complaint that the Governor or the Attorney General of Tennessee have taken any action in the enforcement of the Tennessee conflict of interest statutes. The Governor and Attorney General are nominal parties only (see Paragraphs 12 and 13 of the Complaint, Appendix A, pages B5-B6), and were entitled to notice of any hearing in this case under the provisions of 28 U.S.C. §2224(2).

The Petitioner Lay does not seek an injunction restraining the action of any officer of the State of Tennessee. He seeks to restrain the City of Kingsport from enforcing the challenged statutes "as interpreted by the Courts of Tennessee" in *City of Kingsport* v. *Lay*. As pointed out in Section 1 above, the Tennessee court's opinion is so narrowly limited by the facts of the case that it has in effect "only a local impact" on the City of Kingsport. The constitutional questions thus presented need not be determined by a Three-Judge Court. *Board of Re-*

gents v. *New Left Education Project*, ... U.S. ....., 30 L. Ed. 2d 697, 92 S. Ct. ..... (1972).

In *Moody* v. *Flowers*, (1967) 387 U.S. 97, 18 L. Ed. 2d 643, 647, 87 S. Ct. 1544, this Court said:

> "* * * The term 'statute' in §2281 does not encompass local ordinances or resolutions. The officer sought to be enjoined must be a state officer; a three-judge court need not be convened where the action seeks to enjoin a local officer * * * unless he is functioning pursuant to a statewide policy and performing a state function. * * * Nor does the section come into operation where an action is brought against state officers performing matters of purely local concern. * * * And, the requirement that the action seek to enjoin a state officer cannot be circumvented 'by joining, as nominal parties defendant, state officers whose action is not the effective means of the enforcement or execution of the challenged statute.' * * *"

We submit that a Three-Judge Court is not required to determine these purely local matters.

3. The Complaint shows on its face that Petitioner Lay seeks to enjoin the enforcement of a final state court judgment contrary to the anti-injunction statute (28 U.S.C. §2283).

In *Hill* v. *Martin*, 296 U.S. 393, 403, 56 S. Ct. 278, 282, 80 L. Ed. 293, this Court said:

> "The prohibition of Section 265 [28 U.S.C.A. §2283] is against a stay of 'proceedings now in any court of a state.'
>
> "That term is comprehensive. It includes all steps taken or which may be taken in the State Court or by its officers from the institution to the close of the

final process. It applies to Appellate as well as to original proceedings; and is independent of the doctrine of res judicata. It applies alike to action by the court and by its ministerial officers; applies not only to an execution issued on a judgment, but to any proceeding supplemental or ancillary taken with a view to making the suit or judgment effective. The prohibition is applicable, whether such supplementary or ancillary proceeding is taken in the court which rendered the judgment or in some other. * * *"

The Petitioner Lay seeks, in effect, a mandatory injunction directing the City of Kingsport to contract with the Petitioner Lay as Assistant Superintendent of Schools and pay him his salary while he continues to serve as City Alderman, notwithstanding the final judgment to the contrary rendered against Petitioner Lay in *City of Kingsport* v. *Lay*. Petitioner Lay litigated throughout the state courts of Tennessee his right to serve as Assistant Superintendent while also serving as City Alderman. All constitutional questions raised in this action could have been presented to the Tennessee courts. After a final adverse judgment, he now seeks to have the District Court review and reverse that state court judgment.

This Court has recently had occasion to re-examine the prohibition against enjoining State Court proceedings under the mandate of 28 U.S.C. §2283. In *Atlantic Coast Line R.* v. *Engineers*, 398 U.S. 281, 26 L. Ed. 2d 234, 90 S. Ct. 1739 (1970), this Court said:

"* * * It is settled that the prohibition of §2283 cannot be evaded by addressing the order to the parties or prohibiting utilization of the results of a completed state proceeding. Oklahoma Packing Co. v. Gas Co., 309 U.S. 4, 9, 84 L. Ed. 537, 539, 60 S. Ct. 215 (1940);

Hill v. Martin, 296 U.S. 393, 403, 80 L. Ed. 293, 298, 56 S. Ct. 278 (1935). * * *"

"* * * A federal court does not have inherent power to ignore the limitations of §2283 and to enjoin state court proceedings merely because those proceedings interfere with a protected federal right or invade an area preempted by federal law, even when the interference is unmistakably clear. * * *"

We submit that the injunction sought in this case is not authorized by the anti-injunction statute.

CONCLUSION

For the reasons set forth herein, we respectfully submit that the Petition for Certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHEASTERN DIVISION

DR. ELERY LAY and RITA GLOSECLOSE, THOMAS HULSE, THOMAS RAMSEY, and KATHERINE REED, for themselves jointly and severally and for all others similarly situated with Plaintiffs Gloseclose, Hulse, Ramsey and Reed,

Plaintiffs,

v.

CITY OF KINGSPORT, TENNESSEE, a municipal corporation; CHARLES K. MARSH, City Manager of the City of Kingsport, Tennessee; E. LESTER SHELOR, Recorder-Treasurer of the City of Kingsport, Tennessee; DR. RALPH E. EVANS, Superintendent of Schools of the City of Kingsport, Tennessee; JOHN E. FAUST, President of the Board of Education of the City of Kingsport, Tennessee; BUFORD ELLINGTON, Governor of the State of Tennessee; DAVID M. PACK, Attorney General of the State of Tennessee; and all of their successors, agents, servants, employees, officers and deputies,

Defendants.

Civil No. 2637

COMPLAINT

1. This civil action is instituted to protect the constitutional rights of the Plaintiffs from the application of Sections 6-215, 6-626, and 6-627 of the Tennessee Code Annotated, and of Section 3, Article XX of the City of Kingsport Charter, which as interpreted by the Courts of Tennessee prohibit any person, including a teacher who contracts with a municipal corporation through its Board of Education, from contracting with or having any interest in any contracts with a municipal corporation during the time such person is an officer of or holds office under such municipal corporation. These statutes infringe upon the Plaintiffs' rights guaranteed by the First, Fifth, Ninth and Fourteenth Amendments of the Constitution of the United States and by Article IV, Section 2, Clause 1 and Article VI, Clause 2 of the Constitution of the United States. This action is for a Declaratory Judgment pursuant to 28 U.S.C. §2201, for injunctive relief pursuant to 28 U.S.C. §2202, 28 U.S.C. §1343(3) and 42 U.S.C. §1983, and for damages pursuant to 28 U.S.C. §1331.

2. Jurisdiction is conferred upon this Court as a three-judge tribunal pursuant to 28 U.S.C. §2281 and 28 U.S.C. §2284. This action seeks a declaration that certain state statutes of statewide applicability and a City Charter provision are unconstitutional as applied to these Plaintiffs and seeks injunctive relief to restrain Defendants from enforcing said statutes and charter provision in their capacities as state and local officers on the ground that said statutes and charter provision are unconstitutional as applied to these Plaintiffs.

3. The Plaintiffs, Rita Gloseclose, Thomas Hulse, Thomas Ramsey and Katherine Reed, bring this action on their own behalf and on behalf of all others similarly

situated pursuant to Rule 23 of the Federal Rules of Civil Procedure. This action satisfies the prerequisites for an action under Rule 23. The class consists of those duly registered voters in the City of Kingsport who voted for Dr. Elery A. Lay in May of 1969 for a position on the Kingsport Board of Mayor and Aldermen and who have been denied the right of political association and the right to full and effective political representation and participation by virtue of the intolerable burdens which T.C.A. §6-215, §6-626, and §6-627, and Section 3, Article XX of the Kingsport City Charter place upon Plaintiff Dr. Lay's right to hold the public office to which he was duly elected by the members of this class. The individual Plaintiffs named herein so voted for Dr. Lay to represent them as a member of the Kingsport Board of Mayor and Aldermen.

Members of the class are so numerous that joinder of all members as parties herein is impractical. But there are questions of law common to the entire class, without material factual differences. The claims of plaintiff, as representative of the class, are typical of the class, and he will fairly and adequately protect the interests of the class. There is no adversity of interest between plaintiff and any member of the class. Moreover, the prosecution of separate actions by individual members of the class, both now and in the future, would create a risk of inconsistent and varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for all of the parties. Furthermore, the party opposing the class has acted on grounds generally applicable to the class, and final injunctive and declaratory relief is therefore appropriate for the class as a whole.

4. The individual Plaintiffs, whose names are set forth in the caption, are citizens of the United States and residents of the City of Kingsport, Sullivan County, Tennessee.

5. The Plaintiff, Dr. Elery Lay, is a member of the Board of Mayor and Aldermen of the City of Kingsport, having been duly elected to that position in May of 1969. He also performs the duties of Assistant Superintendent in the City Schools of Kingsport, with the consent of the City Board of Education but without a contract for such position and without salary for reasons set out hereafter in the Complaint.

6. The Plaintiffs, Rita Gloseclose, Thomas Hulse, Thomas Ramsey and Katherine Reed, are duly registered voters in the City of Kingsport and voted for the Plaintiff, Dr. Elery Lay, to represent them as a member of the Kingsport Board of Mayor and Aldermen.

7. The Defendant, City of Kingsport, Tennessee, is a municipal corporation organized under the laws of the State of Tennessee. The City of Kingsport through its Board of Education operates the City School system and pays the salary of all persons employed in the School system as well as all members of its Board of Mayor and Aldermen.

8. The Defendant, Charles K. Marsh, is sued, with his assistants and successors in office, in his official capacity as City Manager of the City of Kingsport, Tennessee. The City Manager is charged under the Charter of the City of Kingsport with the duty to enforce the laws and ordinances of the City; to supervise and control the work of the City Recorder; to approve and certify the payment of creditors or officers and employees of the City

of Kingsport; to approve and sign all City checks for the payment of all personnel of the City including those of the Board of Education; and to sign and approve the checks for the payment of salaries for the members of the Board of Mayor and Aldermen of the City of Kingsport.

9. The Defendant, E. Lester Shelor, is sued, with his assistants and successors in office, in his official capacity as Recorder-Treasurer of the City of Kingsport. The City Recorder is charged under the Charter of the City of Kingsport with auditing all payroll accounts and claims against the City and is specifically charged with not approving or paying any amount claimed against the City unless authorized by law and ordinance.

10. The Defendant, Dr. Ralph E. Evans, is sued, with his assistants and successors in office, in his official capacity as the Superintendent of Schools of the City of Kingsport. The Superintendent of Schools is charged with the general duties of supervising the operation of the Kingsport City Schools and with the duties of lawfully employing teachers for the City Schools of Kingsport.

11. The Defendant, John E. Faust, is sued with his assistants and successors in office, in his official capacity as President of the Board of Education of the City of Kingsport. The President of the Board of Education is the chief officer of the Board. The President of the Board of Education and the Superintendent of Schools sign employment contracts with teachers and other personnel on behalf of the City of Kingsport.

12. The Defendant, Buford Ellington, is sued, with his assistants and successors in office and in his official capacity as the Governor of the State of Tennessee. The Governor is the chief executive officer of the State of

Tennessee and is charged under Article 3, Section 1 of the Constitution of the State of Tennessee with the general duties of enforcing the laws of the United States and the State of Tennessee.

13. The Defendant, David M. Pack, is sued, with his assistants and successors in office, and in his official capacity as Attorney General for the State of Tennessee. The Attorney General of Tennessee is chief legal officer of the State and is charged with, among other things, appearing for the State in the Tennessee Supreme Court, appearing for the State in any Court in the United States in which the State is a party, giving legal advice to various State Officials as required in their duties, and rendering written opinions to all Offices of the State when called upon.

14. The Defendants, Marsh, Shelor, Evans and Faust have their official place of business in Kingsport, Sullivan County, Tennessee. The Defendants, Ellington and Pack, have their official place of business in Nashville, Davidson County, Tennessee.

15. For many years, the Plaintiff, Dr. Elery Lay, has been a teacher with permanent tenure employed by the Board of Education of the City of Kingsport. In 1968, the Board of Education elected him Assistant Superintendent in the City Schools of Kingsport for the school year 1968-69 and on May 20, 1969, re-elected him to that position for the school year 1969-70. Dr. Lay was paid his full salary for both school years by the City of Kingsport. Since July 1, 1970, Dr. Lay has continued to perform the duties of Assistant Superintendent of Schools without a contract for such position and without his salary of $13,210 per year for reasons set out hereafter in this Complaint. In May of 1969, Dr. Lay was duly elected as a member of the Board of Mayor and Aldermen of the City of Kings-

port by the largest electoral vote ever received by a candidate for that office. He was sworn in as an Alderman on July 1, 1969, at an annual salary of $250.00 and currently serves as Alderman.

16. On June 18, 1969, the City of Kingsport, Tennessee, Defendants Charles K. Marsh and E. Lester Shelor, filed in the Law Court, Part I, at Kingsport, Sullivan County, Tennessee, a declaration for declaratory judgment under 23 T.C.A. §1103 against the Plaintiff, Dr. Elery Lay, Pennsylvania National Mutual Casualty Insurance Company, the surety on the bond of the City Recorder-Treasurer, and Aetna Casualty & Surety Company, the surety on the bond of the City Manager. The plaintiffs in that action sought a declaration as to whether or not certain state statutes and Kingsport City Charter would permit the City Manager and the Recorder-Treasurer to lawfully pay Dr. Lay two separate salaries for two separate positions, one as an Alderman, and the second as Assistant Superintendent of Schools. The declaratory judgment action sought a declaration of the rights of the parties under the following Sections of the Tennessee Code Annotated:

T.C.A. 6-215. Restrictions on interest of officers.—

No officer in a municipality shall, directly or indirectly, be interested in any contracts to which the city is a party, or speculate in its bonds or warrants or other evidences of indebtedness; nor shall extra compensation be allowed, or extra pay granted, to any officer, agent, or servant of a municipality, or allowances made for discharge of extra duties.

T.C.A. 6-626. Contracts with officers prohibited.—

No person holding office under any municipal corporation shall, during the time for which he was

elected or appointed, be capable of contracting with such corporation for the performance of any work which is to be paid for out of the treasury. Nor shall such person be capable of holding or having any interest in such contract, either by himself or by another, directly or indirectly.

T.C.A. 6-627. Liability of officer contracting.—

Every officer of such corporation who shall be concerned in making such contract, or who shall pay money upon the same to or for any person declared incapable in 6-626, shall forfeit the amount so paid; and they shall be jointly and severally liable to an action for the same, which action may be prosecuted by any citizen of the corporation in its name.

The declaratory judgment action also sought a declaration of the rights of the parties under the following Section of the Charter of the City of Kingsport:

Section 3, Article XX, Charter of Kingsport.

Municipal officers, employees not to contract with city.—

No member of the board of mayor and aldermen nor any officer or employee of the city shall be connected with or have any interest, direct or indirect, in any contract with the city, or any purchase or sale by or to the city of anything whatsoever. Any person violating this provision shall be removed from office or discharged.

17. In a declaratory judgment handed down by the Honorable Roger E. Thayer, Judge holding Law Court, Part I at Kingsport, Sullivan County, Tennessee, it was ordered that the plaintiffs in the declaratory judgment action could not lawfully pay to Dr. Lay any compensa-

tion for services performed as a teacher or as Assistant Superintendent of Schools in the Kingsport School System until such time as his term of office as Alderman expired or otherwise became vacant.

18. On appeal the Tennessee Court of Appeals held that so long as Dr. Lay remains an Alderman he cannot be paid any sum as salary under any contract made with the City of Kingsport after July 1, 1970, modifying the judgment of the Law Court by holding that Dr. Lay was entitled to both salaries for the school year 1969-1970.

19. A petition for writ of certiorari to the Supreme Court of the State of Tennessee filed on behalf of Dr. Lay was denied by the Supreme Court on November 2, 1970.

20. Since July 1, 1970, the Plaintiff, Dr. Elery Lay, has performed the duties of Assistant Superintendent of Schools of the City of Kingsport without a contract with the City for such a position and without compensation. The sole reason that the City through its Board of Education has refused to sign an employment contract with respect to such position and to pay Dr. Lay a salary for his services in such position is that the Defendants have been prohibited from so acting by the direction of the Courts of Tennessee that such a contract with or payment of salary to Dr. Lay would be in violation of the statutes and charter provision set out in paragraph 16 above as long as Dr. Lay remains a member of the Board of Mayor and Aldermen. The Board of Education of the City of Kingsport by letter from Defendant, Ralph E. Evans, Superintendent of Schools, dated December 1, 1970, has offered to sign a contract with Dr. Lay for the position of Assistant Superintendent of Schools at the salary of $1,125.84 per month, conditioned upon and effective as of the date of Dr. Lay's resignation as a member of the Mayor

and Board of Aldermen with such resignation occurring on or before December 16, 1970 (Later changed to read December 31, 1970, for the purpose of permitting the filing of this Complaint). Furthermore, the Defendant Evans has indicated that if Dr. Lay has not resigned from his duly elected position as a member of the Board of Mayor and Aldermen by December 31, 1970, Dr. Lay will at that time be required to physically vacate his office at the Board of Education and will be prohibited from performing the duties of Assistant Superintendent of Schools or as teacher in that his employment will be considered terminated as of July 1, 1970. In no event does the City or its Board intend to pay Dr. Lay any salary for the period from July 1, 1970, to the date he accepts the employment contract offered by letter from Defendant, Ralph E. Evans, dated December 1, 1970, or to the date he is prohibited from performing the duties of Assistant Superintendent of Schools, despite Dr. Lay having served in that capacity since July 1, 1970.

21. The application of the sections of the Tennessee Code set out in paragraph 16 above and the Section of the Charter of the City of Kingsport set out in paragraph 16 above, to the Plaintiff, Dr. Elery Lay, so as to prohibit him from serving in his duly elected position as an Alderman of the City of Kingsport and as Assistant Superintendent of Schools of the City of Kingsport at the same time and to prohibit him from drawing salaries in both such positions at the same time and the refusal of the Defendants, City of Kingsport, Marsh and Shelor to pay the Plaintiff, Dr. Lay, both of such salaries, and the refusal of the Defendants, City of Kingsport, Evans and Faust, to contract with Dr. Lay as Assistant Superintendent of Schools other than upon the condition that he resign his duly elected position as an Alderman are in-

consistent with the rights to freedom of speech, press, assembly and petition as guaranteed by the First and Ninth Amendments of the Constitution of the United States. The application of said statutes and charter by the Defendants further deprives Dr. Lay of liberty and property without due process of law and of equal protection of laws in violation of the Fifth and Fourteenth Amendments of the Constitution of the United States. The actions of the Defendants under the statutes and charter set out above impose an intolerable and decisive burden upon Dr. Lay's right to seek and to hold public office.

The right to participate and engage in political activity by seeking and holding public office is the ultimate embodiment of the First Amendment rights of free speech, freedom of political association and freedom to petition the government for a redress of grievances. So fundamental is this right that it not only is protected by the First Amendment but also is reserved to the people by the Ninth Amendment. Surely no right is more precious in a free democratic country and to the legitimacy of representative government than that of participating and engaging in political activity which could hardly have meaning if destroyed at its most important stage—the point of seeking and holding public office.

The Supreme Court has often recognized that when fundamental liberties are at stake, a state must justify any classification which restricts those liberties as necessary to achieve a compelling state interest. Therefore, the Court must determine that the interests involved in the restrictions on Dr. Lay's rights to hold public office further legitimate state interest, that the interests involved are so compelling as to permit the resultant infringement on Dr. Lay's fundamental liberties, and that the means used to promote the interests involved are

narrowly enough drawn to meet the test of necessity. Neither the State of Tennessee nor the City of Kingsport has an interest that will justify this infringement of Dr. Lay's constitutionally protected rights and even if the State and/or City should have such an interest reflected in said statutes and charter, that interest is not compelling and could clearly be accommodated by more narrowly drawn legislation which would not so severely interfere with the constitutional rights of Dr. Lay by prohibiting his serving as a duly elected member of the Board of Mayor and Aldermen while serving as Assistant Superintendent of Schools and drawing salaries in both positions.

22. The enforcement of said statutes and charter infringes the right of the Plaintiffs Gloseclose, Hulse, Ramsey and Reed, and the members of their class to be represented, on the Board of Mayor and Aldermen of the City of Kingsport by the candidate voted for by them and elected overwhelmingly by the voters of Kingsport. The denial of the right of these Plaintiffs to be so represented violates their fundamental right to freedom of political association; to effective political representation; to due process of law; and to equal protection of laws, as guaranteed by the First, Fifth and Fourteenth Amendments to the Constitution of the United States.

The coalescence of the right of effective political representation and participation and the First Amendment right of political association was recognized by the United States Supreme Court in *Williams* v. *Rhodes,* 393 U.S. 23 (1968). The Court asserted that the fundamental right of political association for the advancement of political beliefs was illusory without the concomitant power to transform political beliefs into political acts through the voting process. Thus, if the right to vote effectively by

having the candidate duly elected serve his term of office without bearing unconstitutional burdens were not constitutionally guaranteed, the rights of speech, press, assembly, association and petition would be reduced by the states to a right to engage in a meaningless ritual of exercising the citizen's right to vote. It is abundantly certain that this fundamental right is infringed by the actions of the Defendants under the statutes and charter in question which will in effect deny the voters the service of the candidate of their overwhelming choice. Neither the state nor the City has an interest that will justify this infringement of the constitutionally protected rights of the Plaintiffs and members of their class. Furthermore, even should there be such an interest, that interest is not compelling and could be accommodated by more narrowly drawn legislation which would allow the effective political representation of the voters of Kingsport by permitting Dr. Lay to serve as an Alderman and as Assistant Superintendent of Schools and to draw salaries in both positions.

23. There is between the parties an actual controversy as stated herein. The Plaintiffs and members of their class are suffering irreparable injury and are threatened with irreparable injury in the future by reason of the acts herein complained of. The Plaintiff, Dr. Lay, is and remains under a substantial disability in that he is receiving no compensation as Assistant Superintendent of Schools so long as he continues to hold his duly elected position as an Alderman of the City of Kingsport. The Plaintiffs, Gloseclose, Hulse, Ramsey and Reed, and members of their class are and remain under a substantial disability in that their right to representation by the candidate of their choice and of the choice of an overwhelming number of the citizens of Kingsport who voted in the

election for Aldermen is threatened by the actions of the Defendants in applying the statutes and charter to Dr. Lay. Unless the statutes and charter in question are declared unconstitutional as applied to Dr. Lay, and the Defendants restrained from requiring Dr. Lay to elect between serving as Alderman with an annual salary of $250.00 and serving as Assistant Superintendent of Schools with an annual salary of $13,210.00, Dr. Lay will be forced to refrain from performing the duties of Assistant Superintendent of Schools upon which his claim for salary is based. Moreover, unless the Defendants are restrained, Dr. Lay will be required to choose between his two positions, a choice which infringes on the right of both Dr. Lay and the other Plaintiffs to effective political representation and participation in the political process, and a decision which economically leaves him no choice but to resign from his duly elected position as a member of the City Board of Mayor and Aldermen. The Plaintiffs have no plain, adequate or complete remedy to adjust the wrongs and unlawful acts herein complained of other than this action for a declaration of rights and injunction.

WHEREFORE, PLAINTIFFS RESPECTFULLY PRAY that this Court take jurisdiction of this case, and that a special Three-Judge Court be called to hear and determine this cause as provided in 28 U.S.C. §2281 and §2284, and Plaintiffs further pray that the Court advance the case on the docket and order a speedy hearing thereof and upon such hearing adjudge, decree, and declare the rights and legal relation to the parties and declare the practice, policy, custom, or use of the Defendants, their officers, agents, servants, subordinates, employees, and those persons in active concert of participation with them to be in violation of the Constitution of the United States.

The Plaintiffs further pray that the Defendants, their successors, officers, servants, employees, or those persons in active concert of participation with them be permanently enjoined from the acts complained of and from depriving the Plaintiffs of their constitutionally protected rights of free speech, political association, expression, assembly, petition, due process, and equal protection of the laws.

Plaintiffs further pray that a preliminary injunction issue prohibiting the Defendants, Evans and Faust, from requiring the Plaintiff, Dr. Lay, to resign as an Alderman as a condition for his employment as Assistant Superintendent of Schools of the City of Kingsport and requiring the Defendants, City of Kingsport, Marsh and Shelor, to pay to Plaintiff, Dr. Lay, his salary as Alderman and as Assistant Superintendent of Schools so long as he holds both positions, pending a final hearing.

Plaintiffs further pray that the Defendants, City of Kingsport, Marsh and Shelor, pay to Dr. Lay the sum of $1,125.84 per month for each month from July 1, 1970, to the present for his services as Assistant Superintendent of Schools of the City of Kingsport.

Plaintiffs further pray that the Defendants be assessed for costs of the Plaintiffs.

Plaintiffs respectfully pray for such other, further or general relief to which they may be entitled.

/s/ James H. Cheek III
/s/ Charles K. Wray
Attorneys for the Plaintiffs

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APPENDIX B

CITY OF KINGSPORT et al., Appellees.

v.

Dr. Elery A. LAY, Appellant.

Court of Appeals of Tennessee,

Eastern Section.

June 15, 1970.

Certiorari Denied by Supreme Court

Nov. 2, 1970.

Declaratory judgment action to determine whether defendant could receive compensation both as assistant superintendent of education and as alderman. The Law Court, Kingsport, Sullivan County, Roger E. Thayer, J., entered judgment and defendant appealed in error. The Court of Appeals, McAmis, P. J., held that notwithstanding charter and statutory provisions with respect to contracts between municipality and its officers, assistant superintendent of education who was elected alderman was entitled to salaries for both offices during term of contract, but could not receive salary as assistant superintendent if he continued to serve as alderman thereafter.

Judgment modified and affirmed.

1. Declaratory Judgment (Key) 209

Question of whether defendant could be paid by city for services both as alderman and assistant superintendent of education was determinable in declaratory judgment action. T.C.A. § 23-1103.

2. Quo Warranto (Key) 5

City which brought declaratory judgment action to determine whether defendant could be compensated both

as alderman and as assistant superintendent of education was not required to proceed by quo warranto.

3. Officers (Key) 30

Defendant's election as alderman did not abrogate contract previously entered into under which defendant served as assistant superintendent of education.

4. Municipal Corporations (Key) 227

Statutes relating to contracts between municipal corporations and their officers operate prospectively only. T.C.A. §§ 6-626, 6-627.

5. Municipal Corporations (Key) 231(1)

Contract will not be invalidated because made with person who became city officer after it was executed unless appointment as city officer was contemplated by parties at time contract was made and was so related to subject matter thereof as to bring it within reason for rule.

6. Municipal Corporations (Key) 231(1)

Notwithstanding charter and statutory provisions with respect to contracts between municipality and its officers, assistant superintendent of education who was elected alderman was entitled to salaries for both offices during term of existing contract, but could not receive salary as assistant superintendent under any contract made thereafter, so long as he continued to serve as alderman.

Todd & Dossett, Kingsport, for appellant.

W. E. Weber, Kingsport, for appellee City of Kingsport.

Hunter, Smith, Davis, Norris, Waddey & Treadway, Kingsport, for appellee Mutual Casualty Ins. Co.

Moore, Stout & Waddell, Kingsport, for appellee Aetna Casualty & Surety Co.

OPINION

For many years prior to 1968, Dr. Elery A. Lay was a teacher with tenure rights employed by the Board of Education of the City of Kingsport. In that year he was elected Assistant Superintendent of Education and assigned to duty as Director of Special Education and Federal Projects Coordinator and on May 20, 1969, he was re-elected to this position for the school year 1969-1970. In June of 1969 he was duly elected to the position of Alderman of the City of Kingsport and was sworn in as an Alderman July 1, 1969, at an annual salary of $250.00.

Conceiving that Dr. Lay might not be eligible to receive compensation for serving in both positions under certain provisions of the City's charter as well as under the common law and statutes of Tennessee, the City of Kingsport alone with Charles K. Marsh, City Manager, and E. Lester Shelor, Recorder-Treasurer, filed their declaration in this case for a declaratory judgment to have determined whether petitioners could safely pay Dr. Lay the salary due him in both positions. The petition named as defendants Dr. Lay and the bonding companies on the respective bonds of petitioners Marsh and Shelor, both of whom, it was alleged, might incur a personal liability in event they should mistakenly perform their official duties requiring them to approve all vouchers issued by the City.

Dr. Lay moved for a dismissal on the ground his right to hold the office of Alderman could only be tested in a quo warranto proceeding and that, to render a declaratory judgment, would not settle and determine the

rights and obligations of all affected parties. This motion was overruled and Dr. Lay then filed an answer denying generally any conflict between the discharge of his duties in the position of Alderman and his duties as Assistant Superintendent of Education or that he was illegally acting in either capacity and consequently could not be denied the emolument of either position.

After a full hearing on oral testimony the Judge of the Law Court ruled that Dr. Lay could not serve concurrently in both positions; that the City and its disbursing agents or officials could lawfully pay Dr. Lay's salary as an Alderman but could not lawfully pay his salary as Assistant Superintendent. We assume this choice was on the theory Dr. Lay's election as an Alderman abrogated his existing contract as Assistant Superintendent of Education.

As we understand, Dr. Lay has not been receiving either salary and has continued to serve in both capacities without receiving any compensation or salary. The City concedes its obligation for one or the other and avows its willingness to pay both salaries if ordered to do so by final court order.

From the judgment of the Law Court Dr. Lay has appealed and assigned errors. The defendant Surety Companies have filed reply briefs submitting their rights to the protection of the Court.

[1] We first direct our attention to the insistence the Court erred in entertaining the suit as a declaratory proceeding. It is our opinion there was no error in this ruling.

As will appear hereinafter and as alleged in the petition there was a real and bona fide controversy based upon substantial grounds as to whether Dr. Lay could

lawfully receive compensation for acting as Assistant Superintendent and at the same time receive his salary as Alderman. The Charter of the City, Article 10, Section 8, imposed upon Recorder-Treasurer Shelor the duty of auditing payrolls, accounts and claims against the City and provides that no claim against the City shall be paid "unless authorized by law". The Recorder-Treasurer acts under the direction of the City Manager who must also sign City vouchers.

The Declaratory Judgment statute, T.C.A. § 23-1103, provides:

"Any person interested under a deed, will, written contract, or other writings constituting a contract, or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status or other legal relations thereunder."

Under the allegations of the petition the liability of the City for salaries due Dr. Lay, was shown to be in doubt. Its disbursing officials under the Charter could not disburse funds of the City "unless authorized by law". If they disbursed funds not authorized by law they and sureties on their official bonds would have incurred a personal liability.

The state of facts alleged in the bill and shown by the proof under the applicable law it seems to us presented a classic case for a judicial declaration of rights and responsibilities of the petitioners.

"It follows, therefore, from the foregoing authorities, that the only controversy necessary to invoke the action of the court and have it to declare rights under our de-

claratory judgment statute is that the question must be real, and not theoretical; the person raising it must have a real interest, and there must be some one having a real interest in the question who may oppose the declaration sought. It is not necessary that any breach should be first committed, any right is invaded or wrong done. The purpose of the act, as expressed in section 12 thereof, is to 'settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and is to be liberally construed and administered.'" Miller v. Miller, 149 Tenn. 463, 467, 487.

This pronouncement of the Court was reiterated in Williams v. American Plan Corp., 216 Tenn. 435, p. 439, 392 S.W.2d 920. We think the jurisdictional prerequisites above outlined are present in this case and that the suit was properly entertained as a suit for a declaratory judgment unless, as insisted, quo warranto is the exclusive remedy available to petitioners.

[2] It is our opinion it was not necessary for petitioners to proceed by quo warranto. Certainly the disbursing officials were within their rights in asking the Court to determine their duties and obligations in a declaratory proceeding without instituting quo warranto, appropriate only to testing the right of Dr. Lay to hold the office of Alderman. If the Court in a quo warranto proceeding had determined Dr. Lay was entitled to hold that office the question whether, as the Court in this case apparently held, he forfeited his rights under his contract with the Board of Education would have remained unresolved.

It is next insisted that if the present case be held to be within the Declaratory Judgment Act it can not be entertained as such because the Federal and State gov-

ernments furnish a portion of the salary of teachers in the Kingsport school system, including the salary of the Assistant Superintendent, and neither was made a party to this suit. As pointed out in the reply brief this question is being raised for the first time on appeal and, if error, must be considered waived under Rule 12(4) of the Court of Appeals. Additionally, the record shows funds coming from both governments go into the general school fund of the City and are paid out to teachers without regard to the source of such funds. Dr. Lay's contract is with the Board of Education. He receives nothing from the Federal or State government and is not accountable to them in any way.

Turning to a consideration of the merits, it appears the Code of Ordinances, Section 3, Article 20, of the City of Kingsport provides:

"Section 3, Article 20, Municipal officers, employees not to contract with city.—No member of the board of mayor and alderman nor any officer or employee of the city shall be connected with or have any interest, direct or indirect, in any contract with the city, or any purchase or sale by or to the city of anything whatsoever. Any person violating this provision shall be removed from office or discharged."

The bill refers also to the following statutes:

"*T.C.A. 6-626. Contracts with officers prohibited.*—No person holding office under any municipal corporation shall, during the time for which he was elected or appointed, be capable of contracting with such corporation for the performance of any work which is to be paid for out of the treasury. Nor shall such person be capable of holding or having any interest in such contract, either by himself or by another, directly or indirectly."

"*T.C.A. 6-627. Liability of Officer contracting.*—Every officer of such corporation who shall be concerned in making such contract, or who shall pay money upon the same to or for any person declared incapable in 6-626, shall forfeit the amount so paid; and they shall be jointly and severally liable to an action for the same, which action may be prosecuted by any citizen of the corporation in its name."

We find there are conflicting duties and responsibilities in the two positions. In his position with the schools the assistant superintendent assists at the administrative level in making up the annual school budget including expenditures relating to the Federal projects. When completed the budget is submitted to the Board of Education which after considering the recommendations of the Superintendent approves a budget and submits it to the Board of Mayor and Aldermen. This recommended budget includes a lump sum for salaries of the Superintendent and his assistant and other supervisory personnel, as well as the salary of the teaching staff. As an Alderman it is the duty of Dr. Lay to review the budgeted items which as Assistant Superintendent he had a part in formulating. Indirectly if not directly he has a personal interest in the amount approved for salaries and it is only natural that, as Alderman, he will favor the approval of budgeted items pertaining to the projects with which he is personally involved as Assistant Superintendent.

The ordinance and the statutes are directed against all conflicting interests, not solely those involving the monetary interests of the municipality or its officers. Try as he might a person charged with the duties of both positions could not disassociate the duties of one from the duties of the other. Over and beyond this it is important that the public business be free from the taint of suspi-

cion. The record shows Dr. Lay to be a man of probity and unimpeachable character. We are dealing here, however, with the mandate of the law which has as its salutary purpose the protection of the general public interest.

In State ex rel. v. Yoakum, 43 Tenn.App. 123, 306 S.W.2d 39, we said:

"These statutes were enacted more than one hundred [100] years ago. In their application our courts have consistently upheld their salutary spirit and purpose and we have no disposition to weaken their effect or recede from the strictness with which they have been applied."

We consider it of no consequence that Dr. Lay is a teacher protected by tenure. His position as Assistant Superintendent is none the less a contract with the City, through its arm, the Board of Education. Under the circumstances it falls within the purview of the ordinance and the statutes. (We do not understand the City is insisting Dr. Lay has lost his tenure status as a teacher.)

[3, 4] We agree with the general holding of the trial judge that the ordinance and the statute are applicable and denounce the holding of the two positions by one person. We can not agree, however, that the contract for the year 1969-1970, made before Dr. Lay became a member of the Board was abrogated by his subsequent election as an Alderman. The rights of the parties are to be judged as of the date of the contract. The Board to which Dr. Lay was elected could not by any action it might choose to take add to or subtract from either the duties fixed by the contract or the compensation to which Dr. Lay is entitled under it. The contract for that year, therefore, does not fall within the ban either of the ordinance or of the statutes which we hold operate prospectively—not retroactively.

[5] "A contract will not be invalidated because made with a person who became a city officer after it was executed unless his appointment as city officer was contemplated by the parties at the time the contract was made and was so related to the subject matter thereof as to bring it within the reason for the rule." 63 C.J.S., Municipal Corporation, § 992, p. 559, citing in the footnotes; Beaudry v. Valdez, 32 Cal. 269; Koons v. Richardson, 227 Ill.App. 477; See also Heffernen v. Green Bay, 266 Wis. 534; 64 N.W.2d 216; McQuillin, Municipal Corporations, 1966 Revision, Section 29.98.

[6] The effect of our holding is that so long as Dr. Lay remains an Alderman he can not be paid any sum as salary under any contract made with the Board of Education after the school year 1969-1970. For that year he is entitled to be paid both salaries.

As so modified the judgment is affirmed. Costs of the Law Court were taxed to petitoners. Costs of this Court will be taxed to the City of Kingsport.

COOPER and PARROTT, JJ., concur.